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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re JESSICA C., a Person Coming Under
the Juvenile Court Law.

B171332
(Los Angeles County
Super. Ct. No. CK42413)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,
Plaintiff and Respondent,

v.

ROYAL C. and ANNETTE C.,
Defendants and Appellants.

Appeal from an order of the Superior Court of Los Angeles County.

Daniel Zeke Zeidler, Referee. Affirmed.

Lisa A. DiGrazia, under appointment by the Court of Appeal, for Defendant and Appellant Royal C.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant Annette C.

Office of the County Counsel, Larry Cory, Assistant County Counsel and Sterling Honea, Principal Deputy County Counsel.

In this case, we hold that a man claiming to be the presumed father of a dependent child is not entitled to reunification services requested for the first time on appeal. We reject his contention that he received ineffective assistance of counsel. We also find no support for his claim or that of the child's mother that terminating parental rights will be detrimental to the child, Jessica C. We shall affirm the order terminating parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Jessica C., aka Jessica O., became a dependent of the juvenile court after her mother, Annette C., aka, Annette O. (Mother) tested positive for amphetamines and marijuana during delivery. When she was two days old, Jessica was placed in the custody of her current foster family. Mother's other five children are dependents of the juvenile court and live with the maternal grandmother. During the course of the dependency proceedings, Mother married Royal C., who, for the first time on appeal, claims to be Jessica's presumed father.

At the detention hearing, on February 22, 2002, Mother informed the court that Paul S. was Jessica's father. According to Mother, "he raped me and he's being prosecuted." The court asked, "is there any other possible father other than him?" Mother responded "no." The court asked, "what did you do at the hospital?" Mother responded, "they didn't have me fill out any birth certificates or anything." Following that hearing, the court ordered the Department of Children and Family Services (DCFS) to place Jessica with her maternal grandmother if her home were found appropriate, a condition that was never achieved.

On April 8, 2002, at a pretrial resolution conference, Royal appeared with Mother. The juvenile court asked Mother who Royal was, and Mother replied "a friend. He is my ride" Royal did not inform the court that he was Jessica's father. At that hearing, DCFS recommended sustaining the petition, denying reunification services, and setting a

hearing pursuant to Welfare and Institutions Code section 366.26.¹ Royal did not request reunification services.

On May 29, 2002, the juvenile court declared Jessica a dependent child under section 300, subdivisions (b) and (j). It denied Mother reunification services based on Mother's failure to reunify with her other children. (§ 361.5, subd. (b)(10).) A section 366.26 hearing was scheduled for September 3, 2002, but was continued to March 3, 2003, in order to evaluate the maternal grandmother.

A report from the foster family agency dated February 20, 2003, indicated that monitored visits occurred on a weekly basis. "The mother comes to the visits with [Royal], her boy friend, who is allowed by CSW to attend the visits. Both have been observed to have appropriate behavior during the visits; however . . . they have been frequently leaving the office 10-15 minutes before the time of the visit was scheduled to finish. Jessica responds well to their talking and playing." The same report indicates that "Jessica is strongly attached to her foster parents and she is being nurtured and loved and receiving good care by [them]."

A social worker's report dated March 3, 2003, indicates that Jessica's father's name was withheld on her birth certificate, but that Jessica's last name is the same as Royal's last name. A DCFS report dated May 5, 2003, referred to Jessica as Jessica C., using Royal's last name.

On May 5, 2003, the juvenile court found that terminating parental rights would be detrimental to Jessica because she was living with a foster parent who was unwilling to adopt. It appears that the foster mother believed that the maternal grandmother would adopt Jessica and that she would not have the opportunity to adopt Jessica. When she learned of the possibility of adoption, the foster mother indicated "emphatically" that "she would adopt Jessica if given the chance" and that her husband was in agreement.

¹ All further undesignated statutory citations are to this code.

A social worker's report dated September 3, 2003, states that Royal is listed as Jessica's Father on her birth certificate. The social worker also reported that Mother regularly visited Jessica and that she was often accompanied by a neighbor. "Mother is seen in the company of a male friend on each and every visit to the FFA agency to see her daughter."

On October 8, 2003, Royal appeared at the section 366.26 hearing and indicated that, as reflected on Jessica's birth certificate, he is Jessica's father. Michael Kretzmer was appointed to represent Royal. The court stated that Royal had appeared at numerous hearings, but never held himself out to be the father. The court found that at the April hearing Royal "wasn't holding himself out as the father." According to the court, Royal "came to court hearings and never identified himself as the father, came to visits and never identified himself as the father, spoke to social workers and never identified himself as the father." The court further stated, "it's not clear to me that he would have taken the child into his home, if the child hadn't been detained at birth." The court also indicated that Royal was not claiming biological paternity.

Royal's attorney argued that Royal "sees himself in every substantive way, short of being natural biological father, as being the father of Jessica." Royal was in the delivery room when Jessica was delivered and visited Jessica on a regular basis along with Mother. Royal's attorney further represented that, "It's his desire today to exercise as best he can what he believes to be his substantive rights as a father having substantively – as he sees it, fulfilled the role of father. [¶] And he would be supporting a return of the child to the maternal relatives, including maternal grandmother. . . . He would certainly have been more than willing, ready and able to welcome the child into his own home." Mother also requested that Royal be declared a presumed father.

The section 366.26 hearing was continued to November 17, 2003. At that hearing, Royal provided evidence of a declaration of paternity dated February 27, 2002.² The court stated “he’s never claimed to be the biological father. And mother has never said that he’s the biological father and he signed under penalty of perjury that he’s the biological father. That’s very intriguing.” Based on the declaration of paternity, the court granted Royal permission to participate in the proceedings.

Mother testified that she regularly visited Jessica. During the visits, Mother played with Jessica and gave her candy, donuts, and cookies. Mother testified she had a bond with Jessica. She based this on the fact that when Jessica “was around five months she was sick and when she came into my arms there was a bond there where she laid her head on my shoulder” Mother testified Jessica calls Royal “Daddy” and is close to him. After one visit, Jessica cried when Mother and Royal said good-bye.

Royal testified that Mother reads to Jessica and plays with her. Jessica loves him “because she walks up and hugs me and everything else.” Royal testified that he did not want Jessica to be adopted because, “I love that kid.”

A psychologist’s report prepared on September 26, 2003, indicated that Jessica had bonded with her foster family and considered her foster mother to be her primary attachment. The foster mother was active and attentive to Jessica. According to the report, Jessica was much closer to her foster mother than to her maternal grandmother. Jessica would cry when placed in the care of her maternal grandmother and then would appear “immediately consoled” when returned to the care of her foster mother.

The court terminated parental rights and ordered adoption as Jessica’s permanent plan. Mother and Royal appeal from that order. Royal seeks a remand of this case “with direction the juvenile court provide [Royal] at least six months reunification services.”

² Mother also signed the declaration of paternity, which conflicts with her statement to the court that the hospital did not have her complete documents.

DISCUSSION

I. Royal's Status As Jessica's Father

The centerpiece of Royal's appeal is that he should have been found to be Jessica's presumed father. A presumed father – one who is entitled to a statutory presumption that he is the child's father under Family Code section 7611 or 7570 -- rates higher in the dependency scheme than a biological or alleged father.³ (*In re Zacharia D.*, *supra*, 6 Cal.4th 435, 451; *In re Raphael P.* (2002) 97 Cal.App.4th 716, 722-723.) Royal argues that if he were determined to be a presumed father he would have been entitled to reunification services and, if he had received reunification services, he would have obtained custody of Jessica. Royal blames the court, Mother, DCFS, and his attorney for his failure to achieve presumed father status. He claims the juvenile court did not conduct a proper inquiry at the jurisdiction hearing, never considered his paternity, and never determined him to be an unfit parent. He argues Mother thwarted his efforts to establish paternity. He contends the department buried evidence that he visited Jessica and therefore has "unclean hands." And, he claims his trial counsel rendered ineffective assistance of counsel.

In *In re Zacharia D.*, *supra*, (1993) 6 Cal.4th 435, 453, our Supreme Court held that "if a man fails to achieve presumed father status prior to the expiration of any reunification period in a dependency case . . . he is not entitled to such [reunification] services under section 361.5." "[T]he proceeding terminating reunification services and setting a section 366.26 hearing is generally a party's last opportunity to litigate the issue of parental fitness as it relates to any subsequent termination of parental rights, or to seek the child's return to parental custody.'" (*Id.* at p. 447, quoting *In re Mathew C.* (1993) 6

³ The biological father is described as a biological or natural father. A man who may be the father but has not established paternity is described as an alleged father. (*In re Zacharia D.* (1993) 6 Cal.4th at p. 449, fn. 15.) Currently section 361.5, subdivision (a) requires reunification services for the "child and the child's mother and statutorily presumed father or guardians."

Cal.4th 386, 392.) After the 366.26 hearing is set the focus of the dependency proceedings shift from the parent's interest in reunification to the child's interest in permanency and stability. (*Ibid.*) "The court need not continue to consider the issue of reunification at the section 366.26 hearing." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308.)

The trial court originally set a section 366.26 hearing on May 29, 2002. Royal waited until October 8, 2003, to claim that he was Jessica's parent. By the time he came forward, the proceedings were too far advanced for him to attain presumed father status even assuming that he could have established that status if he had come forward earlier. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 453; *In re Emily R.* (2000) 80 Cal.App.4th 1344, 1355.) "While under normal circumstances a father may wait months or years before inquiring into the existence of any children that may have resulted from his sexual encounters with a woman, a child in the dependency system requires a more time-critical response." (*In re Emily R.*, *supra*, 80 Cal.App.4th at p. 1354, quoting *In re Zacharia D.*, *supra*, 6 Cal.4th at p. 452 quoting *Adoption of Lesev S.* (1992) 1 Cal.4th 816, 838.) The reunification period is not extended by a father's decision to wait to assert a paternity claim. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 452.)

Although Royal blames others for his failure to identify himself as father, they did not preclude him from obtaining presumed father status. On April 8, 2002, the court expressly asked who he was and Royal did not identify himself as Jessica's father. Royal was obviously aware of Jessica's birth as he stated he was in the delivery room. And he was aware that Jessica was involved in dependency proceedings as he was present for those proceedings. The trial court expressly found that although Royal was present at several prior hearings he never identified himself as Jessica's father. Royal bears responsibility for failing to inform the court that he was Jessica's parent when the court questioned his relationship to the proceedings.

Royal's claims that the court or DCFS obstructed his ability to claim paternity are unpersuasive. Mother, on the other hand, clearly did not assist Royal; she told the court that the father was Paul S., no one else could be the father, and Royal was her "ride."

She also told the court that no documents were completed at the hospital in contradiction to her later position that Royal signed a voluntary declaration of paternity at the hospital. However, in the end, Royal bore the burden to demonstrate a commitment to his parental responsibilities. He had an opportunity to identify himself as Jessica's father on April 8, 2002, and at the other hearings he attended but never did so.

Royal also argues that his counsel was ineffective for failing "to file a paternity motion and motion to set aside the prior jurisdictional findings and dispositional orders." According to Royal, if such a motion had been filed Royal "would have been granted status as Jessica's presumed father and reunification services."

A man who does not attain presumed father status prior to the end of the reunification period may still request reunification services in the context of a section 388 petition based on changed circumstances. (*In re Zacharia D.*, *supra*, 6 Cal.4th at pp. 454-455.) Royal's counsel did not file a section 388 petition. The test for ineffective counsel is twofold: (1) counsel's representation falls below an objective standard of reasonableness and (2) the deficiency subjects defendant to demonstrable prejudice. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1179.)

Royal has not shown that his counsel's performance fell below an objective standard of reasonableness. Royal argues that there could be no satisfactory explanation for his counsel to not file a motion for presumed father status and to seek reunification services. However, the record reflects that Royal supported "a return of the child to the maternal relatives, including maternal grandmother" Thus, it appears that Royal did not seek custody of Jessica. That is a satisfactory explanation for counsel not to seek reunification services for Royal. The purpose of reunification services is to address the problems that led to the dependency and work toward reunification of the family. (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1362; § 351, subd. (a).) The record suggests that Royal did not want custody of Jessica. In addition to his counsel's statement (which Royal does not challenge on appeal), the court found "it's not clear to me that he would have taken the child into his home, if the child hadn't been detained at birth." At the time Royal came forward he was married to Mother who was adjudicated as unable to

adequately protect or supervise Jessica and Royal does not explain how he would have been able to obtain custody of Jessica if that had been his intention. Contrary to Royal's statement, his counsel's decision not to seek reunification services is consistent with the evidence that Royal did not desire to reunify with Jessica.

Royal also cannot show prejudice. To prevail on a section 388 petition, Royal would be required to show that the requested reunification services would be in Jessica's best interests. In *In re Jerry P.* (2002) 95 Cal.App.4th 793, 816-817, the court held that it was not in the best interest of a child to deny a parent-child relationship to a man who "(1) once he 'knows or reasonably should know of the pregnancy, he . . . promptly attempt[s] to assume his parental responsibilities as fully as the mother will allow and his circumstances permit,' and (2) 'is indisputably ready, willing, and able to exercise the full measure of his parental responsibilities . . . [¶] . . . [¶] . . . emotional, financial and otherwise.'" (quoting *Adoption of Kelsey, supra*, 1 Cal.4th 816, 847, 849.) In contrast to *Jerry P.*, here, the trial court found that Royal did not promptly assume his parental responsibilities. He did not identify himself to the court as Jessica's father until she was 20 months old.

In considering Jessica's best interest, the juvenile court also should consider her placement with her adoptive family. A child may suffer detriment where removed from a thriving placement. (*Armando L. v. Superior Court* (1995) 36 Cal.App.4th 549, 555 [finding father would create a substantial risk of detriment to child's emotional well-being where child was thriving in a secure home and father waited 15 months to have contact with child].) It was undisputed that Jessica's primary bond was with her foster mother. When he was asked why it was not in Jessica's best interest to be adopted, Royal responded, "That's hard to answer." Based on the record on appeal, Royal has not shown that it would have been in Jessica's best interest to extend the reunification period, and therefore he cannot show that "he would have obtained custody of the minor, or at the very least, secured and retained parental rights," the prejudice he alleges.

II. Section 366.26, subdivision (c)(1)(A)

Both Mother and Royal argue that the court erred in finding the section 366.26, subdivision (c)(1)(A) exception inapplicable.⁴ Section 366.26, subdivision (c)(1)(A) provides an exception to the termination of parental rights if the “parents . . . have maintained regular visitation and contact with the minor and the minor would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(A).) In applying section 366.26, subdivision (c)(1)(A), “[T]he juvenile court must engage in a balancing test, juxtaposing the quality of the relationship and the detriment involved in terminating it against the potential benefit of an adoptive family.” (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424-425.)

Here, the juvenile court found: “There are two elements a parent must prove for the (c)(one)(A) exception to apply. The first one, I would say yes, the parents have done that. The Mother and the man who’s now claiming to be the father, the parent must maintain regular visitation. I [find] that the parents if they’ve been visiting a year and half, have maintained regular visitation. [¶] But the second prong is where they fail horribly. That the minor would benefit from a continuing relationship.” “What the Mother and father, so-called father have both testified to is it’s a play time” “They haven’t changed diapers, haven’t been the ones caring for her when she’s been sick, just been the one to rest her head on their shoulder. Clearly the parental role in this child’s life is provided by the current caretakers and not as to parents – not the parents.”

⁴ An alleged father who does not become a party lacks standing to appeal an order terminating parental rights. (*In re Emily R.*, *supra*, 80 Cal.App.4th at p. 1358.) The trial court permitted Royal to appear in the proceedings and for that reason we review his claim of error. (See *ibid.* [“to become a party within the meaning of section 372 of the Code of Civil Procedure, an alleged father in a dependency proceeding must enter an appearance”].)

The juvenile court's finding that Mother and Royal did not satisfy the second prong is supported by substantial evidence, and there was no abuse of discretion. (See *In re Clifton B.*, *supra*, 81 Cal.App.4th 415, 424-425 [appellate court reviews the juvenile court's order terminating parental rights to determine if the order is supported by substantial evidence]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [appellate court reviews juvenile court order for abuse of discretion].) The record indicates that both Mother and Royal regularly visited Jessica, played with her, and fed her candy, cookies, and donuts. While there was some evidence of a connection between Mother, Royal, and Jessica, the record shows no basis for concluding that it would be detrimental to Jessica to terminate this relationship. Mother claims, "it was not her fault that DCFS placed Jessica in a monolingual Spanish-speaking foster home," and it was not her fault that "Mother never had the opportunity to feed Jessica a meal or change her diaper," and it was not her fault that "the foster mother did not bring Jessica to visits when the child was ill" Mother's efforts to evade responsibility highlights the limited role she played in Jessica's life; Mother could not effectively communicate with Jessica, never fed her meals and never changed her diapers.

Royal testified that Jessica loves him and occasionally would call him "Daddy." While he shows that he developed a relationship with Jessica during his visits, he does not show she would suffer detriment if his parental rights were terminated. As the trial court found, at most Royal and Mother have shown that Jessica enjoys playing with them and that they regularly visited them.

The evidence of Mother and Royal's relationship with Jessica must be balanced with the substantial bond Jessica formed with her caretakers. Jessica's proposed adoptive mother was described as "her primary attachment figure." Jessica "was noted to behave quite comfortable and at home in her foster parent's care." Jessica "displayed a clear preference for her foster mother. . . ." Neither Mother nor Royal have demonstrated that the juvenile court erred in rejecting the exception in section 366.26, subdivision (c)(1)(A).

DISPOSITION

The order terminating parental rights is affirmed.

COOPER, P.J.

We concur:

RUBIN, J.

FLIER, J.